NORTH PLAZA SDN BHD A

v.

UNITED SECURITIES SDN BHD

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
WAN ADNAN MUHAMAD JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: W-02-1006-2008]
6 MAY 2009 C

LAND LAW: *Caveats - Removal of - Proprietary rights over land - Separate legal entity - Aggrieved person - Locus standi to make application - National Land Code, s. 327(1)*

CIVIL PROCEDURE: *Costs - Security for costs - Application for - Principles to be applied* D

This was the defendant's/appellant's appeal against the decision of the High Court judge who, *vide* two separate orders in an originating summons action before him for the removal of caveats E pursuant to s. 327 of the National Land Code ('NLC'), had allowed the plaintiff's/respondent's application to remove the caveats and dismissed the appellant's application for security for costs. A company called City Centre Sdn Bhd ('CCSB') was the registered owner of several parcels of land in Kuala Lumpur. The F respondent, at one time the sole shareholder of CCSB, applied for and obtained a loan from Overseas Union Bank ('OUB'). The respondent pledged all its shares in CCSB to OUB as security for the loan. CCSB was subsequently wound up pursuant to a winding-up petition, and a liquidator appointed. The liquidator G then entered into an agreement with the appellant for the sale of CCSB's parcels of land and as a follow-up action to this sale transaction, the appellant lodged caveats on the titles of CCSB's lands. The respondent subsequently filed an originating summons against the appellant to remove the caveats, on the main ground H that the appellant did not have a caveatable interest over the parcels of land (it must be noted that prior to the filing of the originating summons, the respondent had been wound up by an order of the High Court). The respondent's application was successful, resulting in the present appeal by the appellant. I

Held (allowing the appeal with costs)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) The respondent was not the registered owner of the parcels of land in respect of which the caveats were lodged. The registered owner was CCSB. It is an elementary principle of company law that a company – in the context of the present case, CCSB – is a legal entity which is independent and separate from its shareholders. It therefore followed that the respondent, having merely a beneficial interest in the shares of CCSB, did not have any proprietary rights, either legal or equitable, over the parcels of land. Hence, the respondent was not an aggrieved person (or body) in relation to the parcels of land and the caveats for the purpose of s. 327(1) of the NLC; the legal position would still be the same even if the respondent were to be the registered shareholder of those shares. If at all any party was aggrieved by the existence of the caveats, it would be CCSB and not the respondent. Since the respondent was not an aggrieved person, it had no *locus standi* to make the application under s. 327(1) of the NLC. *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Husin* (foll); *Miharja Development Sdn Bhd & Ors v. Tan Sri Datuk Loy Hean Heong & Ors and Another Case* (foll).

(2) Based on the principle in *Northampton Coal, Iron and Waggon Company v. Midland Waggon Company* and considering that the respondent had been wound up by the court, there was, thus, reason to believe that the respondent would be unable to pay the costs of the appellant if the latter were to be successful in its defence. The respondent had also failed to give any credible evidence to the contrary. Although the respondent submitted that the appellant's contention was unjustified since the parcels of land were worth at least RM158 million, there was no merit to this argument because, firstly, there was no valuation report tendered to confirm that the parcels of land were in fact worth RM158 million, and, secondly, in any case, the parcels of land belonged to CCSB, not the respondent, and as such were not the respondent's assets. Furthermore, the appellant had merits in its defence, that is to say, the respondent's prospect of success in their originating summons being extremely slim, if not nil. Indeed, this fact was confirmed by the very fact that this court had just allowed the

appellant's appeal pertaining to the caveats. *Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals* (foll); *Northampton Coal, Iron and Waggon Company v. Midland Waggon Company* (foll).

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan defendan/perayu terhadap keputusan hakim Mahkamah Tinggi yang, melalui dua perintah berasingan dalam sesuatu tindakan saman pemula bagi pembatalan kaveat-kaveat mengikut s. 327 Kanun Tanah Negara ('KTN'), telah membenarkan permohonan plaintif/responden untuk membatalkan kaveat-kaveat dan menolak permohonan perayu untuk jaminan kos. Suatu syarikat yang dipanggil City Centre Sdn Bhd ('CCSB') merupakan pemilik berdaftar beberapa bidang tanah di Kuala Lumpur. Responden, pada satu masa pemegang syer tunggal CCSB, memohon untuk dan memperolehi satu pinjaman dari Overseas Union Bank ('OUB'). Responden mencagarkan semua syer-syernya dalam CCSB kepada OUB sebagai jaminan untuk pinjaman itu. CCSB kemudiannya digulungkan mengikut suatu petisyen penggulungan, dan seorang penyelesai dilantik. Penyelesai selepas itu membuat suatu perjanjian dengan perayu untuk penjualan bidang tanah CCSB dan sebagai satu tindakan susulan kepada transaksi jualan itu, perayu mengemukakan kaveat-kaveat atas hakmilik tanah-tanah CCSB. Responden kemudiannya memfail sesuatu saman permulaan terhadap perayu untuk membatalkan kaveat-kaveat, atas alasan utama bahawa perayu tidak mempunyai kepentingan berkaveat atas bidang tanah itu (ia mesti diperhatikan bahawa sebelum pemfailan saman pemula, responden telah digulungkan melalui suatu perintah Mahkamah Tinggi). Permohonan responden berjaya, mengakibatkan rayuan semasa oleh perayu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Responden bukan pemilik berdaftar bidang tanah di atas mana kaveat-kaveat itu telah dikemukakan. Pemilik berdaftar ialah CCSB. Ia merupakan prinsip asas undang-undang syarikat bahawa sebuah syarikat – dalam konteks kes semasa, CCSB – adalah sesuatu entiti undang-undang yang bebas dan berasingan dari pemegang-pemegang syernya. Oleh yang

demikian responden, yang hanya mempunyai kepentingan benefisial dalam syer-syer CCSB, tidak mempunyai apa-apa hak-hak kepunyaan, sama ada di sisi undang-undang atau ekuiti, atas bidang tanah itu. Oleh itu, responden bukan seorang (atau badan) terkilan berhubung dengan bidang tanah itu dan kaveat-kaveat itu bagi tujuan s. 327(1) KTN; posisi di sisi undang-undang akan kekal sama jikapun responden adalah merupakan pemegang syar berdaftar syer-syer itu. Jika ada mana-mana pihak yang terkilan oleh kewujudan kaveat-kaveat itu, ia adalah CCSB dan bukan responden. Oleh kerana responden bukan seorang terkilan, ia tidak mempunyai *locus standi* untuk membuat permohonan di bawah s. 327(1) KTN. *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Husin* (diikuti); *Miharja Development Sdn Bhd & Ors v. Tan Sri Datuk Loy Hean Heong & Ors and Another Case* (diikuti).

(2) Berdasarkan prinsip dalam *Northampton Coal, Iron and Waggon Company v. Midland Waggon Company* dan memandangkan bahawa responden telah digulungkan oleh mahkamah, terdapat, oleh itu, sebab untuk mempercayai bahawa responden tidak dapat membayar kos perayu jika perayu berjaya dalam pembelaannya. Responden juga telah gagal memberi apa-apa keterangan boleh dipercayai yang bertentangan. Walaupun responden telah menghujah bahawa dakwaan perayu tidak berjustifikasi disebabkan bidang tanah itu bernilai sekurang-kurangnya RM158 juta, tiada merit pada hujahan ini kerana, pertamanya, tidak ada laporan penilaian dikemukakan untuk mengesahkan bahawa bidang tanah itu sebenarnya bernilai RM158 juta, dan, keduanya, walau apa pun, bidang tanah itu dimiliki oleh CCSB, bukan responden, dan oleh itu bukan aset-aset responden. Lagipun, perayu mempunyai merit dalam pembelaannya, iaitu, prospek responden berjaya dalam saman permulaan itu adalah amat tipis, jika bukan tiada langsung. Malah, fakta ini telah diesahkan memandangkan bahawa mahkamah ini telah baru membenarkan rayuan perayu berkenaan dengan kaveat-kaveat itu. *Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals* (diikuti); *Northampton Coal, Iron and Waggon Company v. Midland Waggon Company* (diikuti).

[Diperintah sedemikian.]

Case(s) referred to:

Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd [1985] 1 CLJ 255; [1985] CLJ (Rep) 370 HC ***(refd)***

Drumdurno Pty Ltd v. Braham [1982] 7 ACLR 131 ***(refd)***

KD Resources Sdn Bhd v. Ng Boon Jieh & Son Realty Sdn Bhd & Anor [2003] 1 CLJ 333 HC ***(refd)***

Macaura v. Northern Assurance Co Ltd [1925] AC 619 ***(refd)***

Miharja Development Sdn Bhd & Ors v. Tan Sri Datuk Loy Hean Heong & Ors and Another Case [1995] 1 CLJ 523 HC ***(foll)***

Northampton Coal, Iron, and Waggon Company v. Midland Waggon Company [1878] 7 Ch D 500 ***(refd)***

Skrine & Co v. Mbf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 CA ***(foll)***

Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 4(1), 236(1)(e), (2)(a), 351(1)
National Land Code, s. 327(1)

For the appellant - Wong Kian Kheong (Alex Tan & Yeap Poay Nee with him); M/s Wong Kian Kheong
For the respondent - M Rajenthirakumar; M/s Kumar Assoc

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S1-24-678-2008]

Reported by Suresh Nathan

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal from the decision of the learned judge of the High Court Kuala Lumpur (Civil Division) who, on 20 August 2008, *vide* two separate orders in an originating summons action before him for the removal of caveats pursuant to s. 327 of the National Land Code ('the NLC'):

(1) had allowed the plaintiff's (now the respondent before us) application to remove the caveats; and

(2) had dismissed the defendant's (now the appellant before us) application (*via* encl. 7 in the said originating summons, but heard together with the originating summons) for security for costs.

[2] We have allowed the appeal with costs. We now give the grounds of our decision.

[3] The material facts are not disputed. A company called City Centre Sdn. Bhd. ('CCSB') is the registered owner of several parcels of land in the District of Kuala Lumpur.

[4] The respondent/plaintiff was at one time the sole shareholder of CCSB. It owned 100% of the shares in CCSB. The respondent applied for and obtained a loan from a bank known as Overseas Union Bank ('OUB'). As a security for the loan, the plaintiff pledged all its shares in CCSB to OUB. The shares, having been pledged, were then registered in the name of a nominee for OUB known as OUB 2006 Nominees (Tempatan) Sdn Bhd ('OUB Nominees').

[5] Subsequently, on 25 April 2000, CCSB was wound up pursuant to a winding-up petition by a company known as T. R. Hamzah & Yeang Sdn Bhd. One Chuah Seong Phaik of Messrs Paul Chuah & Co was appointed liquidator for CCSB.

[6] On 9 January 2007, Chuah Seong Phaik, as liquidator and in the name of CCSB, entered into an agreement with the appellant/defendant. By this agreement, Chuah, as liquidator of CCSB, sold those parcels of land belonging to CCSB to the defendant. Pursuant to the sale and purchase agreement, the defendant paid RM7.9 million to the stakeholders jointly appointed by the liquidator and the defendant. As a follow-up action to this sale transaction, the defendant, as purchaser, lodged caveats on the titles of CCSB's lands. These caveats are registered as:

(a) Presentation No: 311/2007; and

(b) Presentation No: 397/2007.

[7] On 4 April 2008, the respondent (United Securities Sdn Bhd) filed an originating summons at the High Court of Kuala Lumpur against the appellant (North Plaza Sdn Bhd) applying to remove the caveats. The main reason given by the respondent for making the application is that the appellant did not have a caveatable interest over the parcels of land.

[8] The respondent succeeded in their originating summons application to have the caveats removed; and, hence, the present appeal by the appellant.

[9] Now, it is pertinent to note that prior to the filing of the originating summons on 4 April 2008, the respondent/plaintiff had been wound up by an order of the High Court of Kuala Lumpur dated 30 January 2007, pursuant to the presentation of a winding-up petition by a company called Equiticorp Holdings Ltd. The Official Receiver was appointed as the liquidator. The respondent appeal to the Court of Appeal against the winding up order, and pending the disposal of the appeal the respondent was granted by the Court of Appeal an interim stay of the winding up order. The respondent's originating summons was filed while the interim stay order was still in force. However, on 6 May 2008 the appeal was dismissed by the Court of Appeal.

[10] At this juncture, we pause to make the following remark. We observe that, even after their appeal had been dismissed by the Court of Appeal, the respondent still proceeded with the originating summons proceeding before the High Court and subsequently obtained an order in their favour on 20 August 2008. This is highly irregular. Strictly, after the dismissal of their appeal by the Court of Appeal, the respondent no longer has any locus to proceed with their originating summons since the winding up order is now confirmed and the interim stay order automatically ended. After the dismissal of the appeal, by reason of s. 236(2)(a) of the Companies Act, which states:

> (2) The liquidator may:
>
> (a) bring or defend any legal action or other legal proceeding in the name and on behalf of the company;

only the liquidator (that is, the Official Receiver) may proceed with the originating summons in the name of the respondent company; and not the directors of the respondent. However, this issue is not raised before us by the appellant in their memorandum of appeal. Nonetheless we strongly felt that we should bring up this matter in passing during the hearing before us.

[11] And when we raised this issue, the learned counsel for the respondent, Encik Rajenthirakumar, explained to the court that the liquidator's solicitors, *via* their letter dated 3 July 2008, had informed the respondent's solicitors that the liquidator consented to the respondent's directors proceeding with the originating summons subject to the latter agreeing to certain conditions (for example, all costs of the proceeding are to be borne by the

respondent and that the respondent is to indemnify the liquidator against any claim from any party arising from the proceeding). We are, however, of the opinion that under the Companies Act, the liquidator has no power to give such consent. It is clear to us, upon reading s. 236(2)(a), that it is for the liquidator himself to proceed with the originating summons – if he wishes to proceed. He cannot authorize or delegate that power to anyone else, including the respondent's directors; and in proceeding with the originating summons, he may, if necessary, engage an advocate (see s. 236(1)(e) of the Companies Act) to act on his behalf.

Application For Removal Of Caveats

[12] One of the issues before us is whether the respondent, in applying to remove the caveats pursuant to s. 327 of the NLC, is an 'aggrieved' person (or body) for the purpose of that section. The provisions of s. 327 reads:

> **327. Removal of private caveats by the Court.**
>
> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.
>
> (2) The Registrar shall, on being duly served with any order under this section for the removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for the cancellation and the date thereof.
>
> (3) Every cancellation under sub-section (2) shall be signed and sealed.

[13] The learned High Court Judge, in allowing the application for the removal of the caveats, was of the view that the respondent was an aggrieved person (or body) for the purpose of the above provision. To arrive at this conclusion, the learned judge first made a finding that the respondent was the beneficial owner of the shares of CCSB notwithstanding the fact that the shares were registered in the name of OUB Nominees. In his judgment, the learned judge said:

> It is not disputed those shares have been pledged and registered in the name of OUB 2006 Nominees (Tempatan) Sdn Bhd as security for a loan granted by Overseas Union Bank to the Plaintiff. The fact the pledge and registration are as security for a

loan granted to the Plaintiff means that the registration in the name of OUB 2006 Nominees (Tempatan) Sdn Bhd implies no immediate proprietorial interest on the part of OUB 2006 Nominees (Tempatan) Sdn Bhd or Overseas Union Bank, and that the Plaintiff retains the beneficial interest in those shares. The fact that the shares are held by a nominee company lends further weight to the limited purpose nature of their registration in the name of OUB 2006 Nominees (Tempatan) Sdn Bhd.

[14] The learned judge then referred to *Miharja Development Sdn Bhd & Ors v. Tan Sri Datuk Loy Hean Heong & Ors and Another Case* [1995] 1 CLJ 523. In this case cited, VC George J (as he then was) said (at p. 529):

They had deposited their shares with the lenders as security for the loans. The shares are held by the lender's nominee company who have had the shares registered in their name in their capacity as a nominee company. It has not been suggested that they hold the shares otherwise. As their name suggests they only hold the shares nominally; they hold them on trust for the real shareholders. While a company need not, shall not, look behind the share certificate, that is not to say that in fact shares cannot be held in trust by one person on behalf of a beneficiary.

[15] The learned High Court judge in the present case thereafter made the following finding:

26. OUB 2006 Nominees (Tempatan) Sdn Bhd thus stands as a trustee for the Plaintiff, and in the event the security was availed of, it remains as trustee for the residual interests of the Plaintiff who is at all times the beneficial owner of the shares, and each beneficial owner has a complete right of a proprietary nature to share in the surplus assets.

[16] The learned judge also made a further finding as follows:

27. The Court accepts that as the beneficial owner of the shares in City Centre, the Plaintiff is a contributory of City Centre in the winding-up. The Plaintiff has, therefore, a direct interest that the assets of City Centre are disposed off according to the terms of the order of the Winding-Up Court, which procedures were to ensure that assets are disposed off at appropriate values to ensure that creditors and contributories will be able to recover what is due to them respectively. As such the Plaintiff has a direct interest that procedures approved by the Court under the winding-up order since the Plaintiff may, as a contributory, be exposed if there is shortfall and certainly is beneficially entitled to the balance

A in the event there is an excess. Indeed the Liquidator is an equitable trustee for those entitled to the assets of a company in a winding-up, be they creditors or shareholders for all have an interest in value being obtained for the assets of a wound-up company.

B **[17]** The learned counsel for the appellant, on the other hand, submitted before us that the respondent has no legal or equitable interest in the several parcels of land and is therefore not aggrieved by the caveats. He pointed out to us the undisputed fact that the respondent is not the registered proprietor of the C parcels of land. He stressed the fact that the registered proprietor of the parcels of land is CCSB.

[18] Now, as to the meaning of 'aggrieved' for the purpose of s. 327(1) of the NLC, the Court of Appeal in *Wu Shu Chen & D Anor v. Raja Zainal Abidin Raja Hussin* [1997] 3 CLJ 854 made the following remark (see at p. 868, the judgment of the court, delivered by Mokhtar Sidin JCA):

> The Code contains no definition on who is an aggrieved person. E To my mind, the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never F closed.

[19] With the above broad principle in mind, on the facts of the case before us, particularly, the fact that the respondent is not the registered proprietor of the parcels of land, nor a *bona fide* G purchaser for value of the same, it is our judgment that the respondent is not an aggrieved person for the purpose of s. 327(1) of the NLC.

[20] We are, however, prepared to accept that the respondent, being the pledgor of the shares of CCSB, and following *Miharja* H *Development*, has a beneficial interest in those shares. Be that as it may, on the question as to whether or not the respondent is a contributory in relation to CCSB, we, however, wish to refer to the definition of 'contributory' as provided for in s. 4(1) of the Companies Act 1965. In this section, the word 'contributory' is I given the meaning:

> … a person liable to contribute to the assets of the company in the event of being wound up, and includes the holder of fully paid shares in the company and, prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory.

[21] In *Miharja Development* VC George J expanded the above statutory meaning of the word 'contributory' to include shareholders who have charged their shares as security for a loan and had the shares thereafter registered in the name of a nominee company – the nominee of the lender/pledgee. With respect, by reason of the above definition of 'contributory', we are not prepared to go so far as to hold that the respondent is a contributory in relation to CCSB. In other words, with the respect, we are not in agreement with the views of the learned High Court Judge and VC George J on this point.

[22] But the fact remains that the respondent is not the registered owner of the parcels of land in respect of which the caveats are lodged. The registered owner, as has been pointed out earlier, is CCSB. It is an elementary principle of company law that a company (and in the context of the present case, it is CCSB) is a legal entity which is independent and separate from its shareholders. It therefore follows that the respondent, having merely a beneficial interest in the shares of CCSB, does not have any proprietary rights (either legal or equitable) over the parcels of land (*Macaura v. Northern Assurance Co Ltd* [1925] AC 619; *Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd* [1985] 1 CLJ 255; [1985] CLJ (Rep) 370). Hence, the respondent is not an aggrieved person (or body) in relation to the parcels of land and the caveats for the purpose of s. 327(1) of the NLC; and the legal position would still be the same even if the respondent were to be the registered shareholders of those shares. In our view, if at all any party is aggrieved by the existence of the caveats, it would be CCSB and not the respondent. Since the respondent is not an aggrieved person, they have no *locus standi* to make the application under s. 327(1) of the NLC.

Application For Security For Costs

[23] Before the learned High Court Judge there was an application by the appellant/defendant pursuant to s. 351(1) of the Companies Act for security for costs in the sum of RM150,000 (or such amount as the court deemed fit). Section 351 provides:

Security for costs.

351. (1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until security is given.

[24] The reasons advanced by the respondent for the application were that:

(a) the respondent/plaintiff had been wound up by the court; and as such there was a high risk that the respondent would not be able to pay costs to the appellant/defendant in the event that the respondent's originating summons were to be dismissed by the court; and

(b) the appellant had good grounds in opposing the respondent's originating summons.

[25] In dismissing the appellant's application for security for costs, the learned High Court Judge said:

19. The ground relied upon in this case is that the Plaintiff company is wound up. It must be borne in mind the ground for a winding-up is that it is fair and equitable that the company be wound-up. However, it may be fair and equitable to wind-up a company for a number of reasons. The common ground is that it is unable to pay its debt as they fall due. It does not mean it does not have sufficient assets and be unable to pay. Therefore, reliance upon the ground that the company has been ordered to be wound-up, the bills could be submitted to the Liquidator. There is also no evidence put before this Court to suggest that the debts of the Plaintiff and its 100% subsidiary, City Centre, would exceed the market value of the lands in dispute.

[26] With respect, we have a different view.

[27] To begin with, we propose to refer to *Skrine & Co v. Mbf Capital Bhd & Anor & Other Appeals* [1998] 3 CLJ 432, where Gopal Sri Ram JCA (as he then was) said (at p. 444):

In order to appreciate the arguments of counsel in support of these appeals, it is necessary to hearken to the statutory provision under which the applications were made. It is s. 351 of the Companies Act 1965 which reads:

> Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until security is given.

> As may be seen, and this is borne out by the authorities decided upon parallel provisions in other common law jurisdictions, the section provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

[28] In the instant case it is common ground that the respondent company has been wound up by the court. In *Northampton Coal, Iron, and Waggon Company v. Midland Waggon Company* [1878] 7 Ch. D 500 Jessel MR said (at p. 503):

> I should say that the fact of the Plaintiff company being in liquidation would be sufficient "reason to believe" the assets to be insufficient unless evidence to the contrary was given.

[29] Based on the above principle, and considering that the respondent had been wound up by the court, there is, therefore, reason then to believe that the respondent would be unable to pay the costs of the appellant if the latter were to be successful in their defence – unless evidence to the contrary is given by the respondent. The inquiry then would be: has the respondent given any evidence to the contrary? We must say that we are unable to find any credible evidence to the contrary.

[30] The learned counsel for the respondent, nevertheless, submitted that the appellant's contention that there is a high risk that the respondent would not be able to pay costs to the appellant is unjustified. It is unjustified – so argued counsel – because the parcels of land are worth at least RM158 million. In our judgment, there is no merit in this argument because, firstly, there is no valuation report tendered to confirm that the parcels of land were in fact worth RM158 million; and, secondly, in any

A case, the parcels of land do not belong to the respondent: they belong to CCSB, and as such the parcels of land are not the assets of the respondent.

[31] And by reason of what we have already said in our
B judgment above, we are satisfied that the appellant has merits in their defence, that is to say, the respondent's prospect of success in their originating summons being extremely slim, if not, nil. Indeed, this fact is confirmed by the very fact that we have just allowed the appellant's appeal pertaining to the caveats. It is a
C principle of law that the respondent's prospect of success is also a relevant factor (among others) in deciding as to whether or not security for costs ought to be ordered against the respondent (see *Drumdurno Pty Ltd v. Braham* [1982] 7 ACLR 131; and *KD Resources Sdn Bhd v. Ng Boon Jieh & Son Realty Sdn Bhd & Anor*
D [2003] 1 CLJ 333).

[32] In conclusion, apart from setting aside the order of the High Court pertaining to the originating summons itself, we are also setting aside the order of the learned High Court Judge refusing
E security for costs. Instead, we are making an order that the respondent do deposit as security for costs a sum of RM40,000, such sum to be deposited within three months of this order.

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